IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1673

LEROY W. SUGG,

Petitioner,

vs.

PEOPLE OF THE STATE OF ILLINOIS,

Respondent.

(On Petition for a Writ of Certiorari to the Appellate Court of Illinois, First District)

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

WILLIAM J. SCOTT,
Attorney General, State of Illinois,

JAMES B. ZAGEL,
JAYNE A. CARR,
Assistant Attorneys General,
188 W. Randolph Street (Suite 2200),
Chicago, Illinois 60601,

Attorneys for Respondent.

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QUESTION PRESENTED

Whether the Illinois Appellate Court properly applied the standard of prosecutorial duty in submitting evidence to defense counsel in this case.

STATEMENT OF FACTS

On February 10, 1973, Joseph Hauser and his girlfriend, Veronica Cajowski were in his apartment with his roommate James Savino, when someone knocked on the door. (R. 16-17, 124-125) Hauser left the bedroom to answer the door. (R. 125) Savino, who was in the bathroom and Miss Cajowski, who remained in the bedroom, heard a loud commotion in the front room. Miss Cajowski went to the front room where she saw the defendant Leroy Sugg holding a gun and saw Steven Bataglio beating Hauser. (R. 126-127) Savino stepped into the hallway but was ordered at gunpoint by Bataglio to return to the bathroom. (R. 20-22) Savino attempted to leave the bathroom a second time and was shot at by Bataglio. (R. 22-24) Fifteen or twenty minutes after Sugg and Bataglio arrived, the apartment bell rang. It was located at the rear of the apartment and could not easily be heard in the front room. Miss Cajowski pressed the buzzer to admit the person. (R. 25, 128-130) Savino again left the bathroom and saw that his friend, Ronald Talerico, had arrived. He also saw Hauser sitting on the floor, bleeding from the head and face. (R. 24-26) Sugg and Bataglio dragged Hauser across the floor and Hauser was struck on the head by Sugg with the butt of a gun. After the beating Hauser did not move. (R. 26-27) Bataglio took Talerico to the bedroom. He noticed that there was a telephone in the bedroom, accused Miss Cajowski of phoning the police and took her with them as a hostage. (R. 27-29, 130) On her way out of the apartment she saw that the living room was in a shambles and Hauser was bleeding. (R. 131-132)

Sugg and Bataglio lived in an apartment on the first floor of the building and apparently their hostility stem-

med from the fact that Hauser's and Savino's visitors often rang the defendant's bell for admittance to the apartment building. (R. 36-38) Sugg brought Miss Cajowski to his apartment and called Bataglio, still in Hauser's apartment, at two, fifteen minute intervals to see if the police had arrived. (R. 30, 134, 135) Sugg and Miss Cajowski then went back upstairs. (R. 31)

According to Miss Cajowski, something appeared to aggravate Bataglio who picked up a bat and shattered the picture tube of the television. (R. 136) This was the only time Miss Cajowski saw a bat in the victim's apartment. (R. 132, 136, 164) Although Savino's testimony indicated that the defendant may have had the same bat during the beating, Savino did not personally observe either the defendant or Bataglio use this weapon to strike the victim. (R. 39-40, 45, 50-51, 75, 81-83, 111-112) He said that the bat was not in his apartment before the defendant and Bataglio entered about 10:00 p.m. and that they left it on the living room floor. (R. 83-86) He did not know what subsequently happened to the bat because he moved out of his apartment the next day, and took only a few items of clothing with him. (R. 88, 91)

Before Bataglio and Sugg left the apartment, they told Savino that he should fabricate a story to explain Hauser's injuries or Miss Cajowski would be hurt. (R. 31, 136-137, 140) Miss Cajowski, Savino, and Talerico helped Hauser into Talerico's car and took him to a hospital. (R. 32, 137) Savino did not appreciate the seriousness of Hauser's injuries, and told the hospital personnel that Hauser had been beaten by a group of Puerto Ricans. (R. 32-34) After he discovered that Hauser was in critical condition and was dying, he went to the police and related what actually

transpired on February 10, 1973. (R. 33-35, 87-88) The police then called on Miss Cajowski who, having learned of Hauser's grave condition, informed them of the events on February 10, 1973. (R. 137-140) She had not contacted them earlier because she expected Hauser to recover and handle the problem himself. (R. 139) She also feared reprisals by the defendant and Bataglio since the defendant knew her parents' address. (R. 139) Hauser died on February 18, 1973. (R. C120)

Shortly after midnight on February 11, 1973, Officer Paul of the Chicago Police Department talked to hospital personnel who had treated Hauser and learned that Savino had told them that Hauser was beaten and robbed by three male Puerto Ricans. Officer Paul who was wearing civilian clothes and two other officers, also in civilian clothes went to Savino's apartment. (R. 170-171, 176-178) While they were on the first floor of the apartment building Sugg and Bataglio came out of their apartment wearing bloodstained shirts and pants. (R. 172-173, 178, 186)

Thinking that the defendant and Bataglio had been injured in an incident unrelated to his investigation, Officer Paul, who had not revealed his identity, asked if they were all right. (R. 173-175) The defendant said, "We're all right. But we beat the shit out of the guy upstairs." (R. 174-75) Bataglio then interjected, "Yeah, we got him. He keeps ringing our door bell." (R. 175) And the defendant added, "Yeah, the jackoff is always ringing our door bell." (R. 175)

The morning following the beating Savino moved out of the building, taking only a few items of clothing with him. (R. 88-91) A few days later the landlady, Mrs. Sato, went to the apartment to change the locks. (R. 198) Mr.

Sato removed a set of encyclopedias, three expensive leather coats and some furniture from the apartment after Hauser's death. (R. 223) Mrs. Sato returned to the apartment near the end of the month to clean. She testified that she found a club or bat under a cocktail table and turned it over to defense counsel who marked it as defendant's exhibit #4 for identification. (R. 205, 207)

The defendant testified that he made no admission of beating the victim to the police officers. This story was corroborated by Mr. Sato who admitted on cross examination that Hauser owed him about $400. (R. 250, 218-222) The defendant also said that he didn't know anything about a club. (R. 267)

At the preliminary hearing on March 19, 1973, defense counsel turned over an exhibit, a club, to the State for purposes of analysis. (R. C103, 111-112) Although the club had not been analyzed by the time the trial started, it was subjected to micro-analysis during the trial. In a conference call on September 12, 1973, Sergeant Louis Vitullo of the Microanalysis Section of the Chicago Police Department's Criminalistics Division informed the trial judge and defense counsel that an examination of the club revealed a reddish substance of one end of the club which proved to be human blood. The blood could not be typed. Sergeant Vitullo further informed them that the club had not been examined for fingerprints. (R. 10) Before this call was made the prosecutor, Mr. Schaffner, advised the court that he had inquired about the club and learned that "fingerprints were not a feasible thing to expect from that exhibit." (R. 7) The club was returned to defense counsel in time for identification by a defense witness, Sarah Sato. (R. 205)

REASON FOR DENYING THE WRIT

The Illinois Appellate Court Properly Applied The Standard Of Prosecutorial Duty In Submitting Evidence To Defense Counsel In This Case Where The People Did Not Obtain Fingerprint Analysis Of Extraneous Evidence Which Was Temporarily Within Their Possession Between The Preliminary Hearing And Trial But Was In The Possession Of The Defendant At All Other Times.

In 1963, this Court prescribed the duty of a prosecutor regarding the submission of evidence within his possession to the defendant. *Brady* v. *Maryland*, 373 U.S. 83, 83 S.Ct. 1194 (1963). That case held that:

> ". . . [T]he suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or punishment, irrespective of the good faith or bad faith of the prosecution."
>
> *Brady* v. *Maryland, supra* at p. 87

These guidelines were discussed further by this Court in *Moore* v. *Illinois*, 408 U.S. 786 (1972):

> "The heart of the holding in *Brady* is the prosecution's suppression of evidence, in the face of a defense production request, where the evidence is favorable to the accused and is material either to guilt or to punishment. Important, then, are (a) suppression by the prosecution after a request by the defense, (b) the evidence's favorable character for the defense, and (c) the materiality of the evidence." 408 U.S. 784-785

The alleged abuse in this case, the failure to analyze the bat for fingerprints, does not even pass the threshhold question in determining a violation of the *Brady* standard—that there has been a suppression by the prosecution. The

bat was found by the landlady of the building in which the fight occurred. She turned it over to *defense counsel*, who had it until the preliminary hearing. At the preliminary hearing defense counsel said he would give the bat to the prosecutor to determine who the owner was. The prosecutor indicated he would investigate it and submit it to analysis. The judge and counsel were informed of the microanalysis results by the crime lab technician and were told that fingerprints should not be expected from the exhibit. Defense counsel made no objection to the lack of a fingerprint test and at no time made a request for a continuance to have the bat independently analyzed. The bat was returned to defense counsel for his use at trial.

This situation certainly does not constitute "suppression" of evidence by the prosecutor within the proscription of *Brady*. The language of that case is clear in its import and courts have consistently construed it to mean that a prosecutor is not required to turn over evidence to the defense that is either available to the defense or does not exist. *United States* v. *Romano*, 482 F.2d 1183 (5th Cir. 1973); *Escobedo* v. *United States*, 350 F.Supp. 894 (Aff'd. 489 F. 2d 758 (7th Cir. 1973); *United States* v. *Akin*, 464 F.2d 7 (8th Cir. 1972); *Brown* v. *Crouse*, 425 F.2d 305 (10th Cir. 1970); *United States* v. *Mackin*, 502 F.2d 429 (D.C. Cir. 1974).

Further, any claim that the prosecution "contaminated" the bat is unfounded. The bat was found several days after the incident; was handled, at least, by the landlady, defense counsel, and by Savino in court (R. C103) Given this uncertain path which eventually led to the crime lab, it is unreasonable to presume that the prosecutor is responsible for some alleged contamination.

CONCLUSION

For the foregoing reasons, respondents respectfully request this Court to deny the Petition For Writ of Certiorari.

Respectfully submitted,

WILLIAM J. SCOTT,
Attorney General, State of Illinois,

JAMES B. ZAGEL,
JAYNE A. CARR,
Assistant Attorneys General,
188 W. Randolph Street (Suite 2200),
Chicago, Illinois 60601,

Attorneys for Respondent.

• KAREN S. THOMPSON, a recent graduate of DePaul University, College of Law, assisted in the research and preparation of this Brief.